INDEX

	Page
Opinion below	1
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	17

CITATIONS

Cases:	
Arkansas Wholesale Grocers' Assn. v. *Federal Trade Comm.*, 18 F. (2d) 866	12
Chamber of Commerce v. *Federal Trade Comm.*, 13 F. (2d) 673	12
Cudahy Packing Co. v. *Holland*, 315 U. S. 357	14
Federal Trade Comm. v. *Goodyear Co.*, 304 U. S. 257	11
Fleming v. *Cincinnati Union Terminal Co.*, 117 F. (2d) 1012	10
Fleming v. *Jacksonville Paper Co.*, 128 F. (2d) 395	9
Fleming v. *Sta-Rite Ginnie Lou Company*, 3 Wage Hour Rept. 174	6
Goshen Mfg. Co. v. *Myers Mfg. Co.*, 242 U. S. 202	14
Guarantee Veterinary Co. v. *Federal Trade Comm.*, 285 Fed. 853	12
Henderson v. *Burd*, 133 F. (2d) 515	14
Jacobs v. *Hand Knitcraft Institute*, 2 Labor Cas. (C. C. H.) 144	6
Jacobs v. *The Hump Hairpin Mfg Co.*, 3 Wage Hour Rept. 13	6
National Labor Relations Board v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295	12
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261	11
Otis & Co. v. *Securities and Exchange Comm.*, 106 F. (2d) 579	12
Perma-Maid Co. v. *Federal Trade Comm.*, 121 F. (2d) 282	12, 13
Sears, Roebuck & Co. v. *Federal Trade Comm.*, 258 Fed. 307	12, 14

	Page
Cases—Continued.	
Southern Pacific Terminal Co. v. *Interstate Commerce Comm.*, 219 U. S. 498	11
United States v. *San Francisco*, 310 U. S. 16	14
United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290	11
United States v. *Van Wagener-Sager, Inc.*, 34 F. Supp. 735	6
Walling v. *Shenandoah-Dives Mining Co.*, 6 Wage Hour Rept. 304	11
Statutes:	
Clayton Act	16
Fair Labor Standards Act of 1938, 52 Stat. 1060 (29 U. S. C. 201 *et seq.*):	
Sec. 6	4
Sec. 6 (a) (3)	4
Sec. 8	4
Sec. 11 (a)	2
Sec. 16 (a)	16
Sec. 16 (b)	16
Sec. 17	2, 13, 15
National Labor Relations Act (29 U. S. C. 160 (e))	13
Securities and Exchange Act (15 U. S. C. 78 (u))	13
Sherman Act	16
Social Security Act of August 14, 1935, 49 Stat. 635 (42 U. S. C. 901)	4
Miscellaneous:	
Interpretative Bulletin No. 1, par. 7, 1940 Wage Hour Man. 129	5
Regulations on Records to be Kept by Employers, October 22, 1938, 3 F. R. 2533	5
Amendment, 4 F. R. 968	6
Amendment, 4 F. R. 4046	6
Wage-Hour Reporter:	
"Advisory Opinions"	7
"Employers Questions Answered"	7
"Official Answer to Questions"	7
Wage order for the Embroideries Industry, promulgated by the Administrator, effective January 27, 1941	4

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1019

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

T. BUETTNER AND COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered February 11, 1943, reversing a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and directing the dismissal of the complaint.

OPINION BELOW

The opinion of the District Court (R. 441–451) is reported in 5 Wage Hour Rept. 279 (1942).

The opinion of the Circuit Court of Appeals (R. 514–516) is reported in 133 F. (2d) 306.

QUESTION PRESENTED

Whether the discontinuance of violations under official pressure requires denial of injunctive relief against an employer under Section 17 of the Fair Labor Standards Act of 1938, where there is proof of substantial violations over a long period of time and the employer continues to assert the legality of such past practices.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 *et seq.* The provisions directly pertinent are:

> SECTION 11 (a):
>
> * * * the Administrator shall bring all actions under section 17 to restrain violations of this Act.
>
> SECTION 17:
>
> The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition,

title 28, sec. 381), to restrain violations of section 15.

STATEMENT

Respondent, an Illinois corporation, with its principal office and factory in Chicago, has long been engaged in the wholesale distribution of patterns for various kinds of needlework and threads for use in completing the patterns (R. 24–25, 451–452). To facilitate the sale of these patterns, models with the embroidery completed are sold to retailers so that the appearance of the pattern when completed may be observed (R. 25–26, 452). Approximately 87 percent of these models are sold to retailers outside of the State of Illinois (R. 26, 452).

Approximately 200 home workers performed the embroidery work to complete the stamped patterns (R. 454). This work was performed under detailed instructions from respondent, which also supplied the thread for the work (R. 31, 47, 50, 58, 62, 63). Respondent, by time tests made with expert needleworkers at its plant (R. 291–294), calculated the compensation to be paid the home workers so that it would approximate ten cents per hour (R. 294–295, 399). The District Court found that, in fact, the majority of the home workers earned an average of ten cents an hour for their work (R. 453–454). The lowest hourly

rate permitted under the statute at any time during the period in suit was 25 cents per hour.[1]

Shortly before the effective date of the Fair Labor Standards Act respondent sought and obtained the advice of its attorneys that these home workers were "independent contractors" and not subject to the provisions of the Fair Labor Standards Act (R. 449). In 1936, shortly after the enactment of the Federal Social Security Act (Aug. 14, 1935, 49 Stat. 635, 42 U. S. C. 901), respondent adopted the practice of imprinting upon memoranda included with the bundles of materials sent to the home workers a stamped statement to the effect that the work was accepted by the home worker as an independent contractor and not as an employee, and that the respondent was not subject to the Federal or any State social security, unemployment insurance, old age pension, or workmen's compensation laws. At about the time the Fair Labor Standards Act

[1] The minimum rate prescribed by Section 6 of the Act between October 24, 1938, the effective date of the statute, and October 23, 1939, was 25 cents per hour. A minimum rate of 30 cents per hour is prescribed by the section for the period between October 24, 1939, and October 23, 1945, when it is to become 40 cents. Section 6 (a) (3) provides for the payment of a rate between 30 and 40 cents per hour prescribed in an order of the Administrator issued under Section 8 of the statute. A wage order for the Embroideries Industry was promulgated by the Administrator and became effective on January 27, 1941, thus increasing the rate applicable to the respondent's employees from 30 cents to 37½ cents per hour.

went into effect, this stamp was amended to include the Wage and Hour Law among those to which respondent stated it was not subject. Checks made out to the home workers contained the same stamp. In April, 1939, a "memorandum of agreement" was substituted for the previous memorandum, also reciting that the home worker was an independent contractor. The home workers were requested to sign this memorandum in order to obtain their compensation. (R. 455–456). During the period in which the home workers were designated independent contractors they continued to receive compensation at the rate of approximately ten cents per hour (R. 501–504).

On October 12, 1938, almost two weeks before the effective date of the Act, the Administrator, in a widely distributed interpretative bulletin, announced that "Since the Act contains no prescription as to the place where the employee must work, it is evident that employees otherwise coming within the terms of the Act are entitled to its benefits *whether they perform their work at home,* in the factory, or elsewhere." [Italics supplied.] Interpretative Bulletin No. 1, par. 7, 1940 Wage Hour Man. 129, 131. Another statement of the Administrator's position that the Act applied to such home workers was contained in the "Regulations on Records to be Kept by Employers,"

published as early as October 22, 1938, in the Federal Register (3 F. R. 2533).[2] Amendments to these Regulations, providing specific instructions for the keeping of wage and hour records for industrial home workers, were published in the February 18, 1939 and September 26, 1939 issues of the Federal Register (4 F. R. 968, 4046).

Long prior to the institution of the instant action, numerous civil actions and a number of criminal cases involving industrial home workers had been instituted, some of which are reported, and others of which were against employers in the vicinity of respondent's plant. See *Jacobs* v. *The Hump Hairpin Mfg. Co.*, located in Chicago, Illinois, 3 Wage Hour Rept. 13 (N. D. Ill.) (consent judgment entered December 29, 1939)); *Fleming* v. *Sta-Rite Ginnie Lou Company,* 3 Wage Hour Rept. 174, 180 (E. D. Ill.) (consent judgment entered April 30, 1940)); *Jacobs* v. *Hand Knitcraft Institute,* 2 Labor Cas. (C. C. H.) 144 (S. D. N. Y. 1939); *United States* v. *Van Wagenen-Sager, Inc.,* 34 F. Supp. 735 and 736 (N. D. N. Y.).[3]

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[2] The following provision was included in these regulations: "* * * the required records shall be made and preserved by the employer for 'industrial homeworkers' or other employees who produce goods for the employer from material furnished by him or who are compensated for such employment at piece rates, wherever such employees actually perform their work."

[3] Thus the statement of the court below that the Administrator had "taken no position by regulation or otherwise on this relationship (R. 515)" is accurate only in the very limited

The Wage and Hour Division commenced an inspection of the respondent's compensation practices on April 16, 1941, about two and one-half years after the effective date of the Act. On April 23, 1941, the respondent discontinued sending work to its home workers and thereafter caused the work formerly sent out to home workers to be performed by employees at its plant in Chicago (R. 393, 397, 456–457). Prior to that time, respondent had employed a few needleworkers (called "sample workers") at its plant to embroider the original models under the supervision of the designers (R. 306–307). About ten additional needleworkers were brought into the plant when home work was discontinued (R. 318), and the volume of production was apparently curtailed (R. 397–398). There is evidence indicating that home work was discontinued to await the outcome of this litigation. On October 20, 1941, the supervisor of respondent's display model department

sense that no explicit opinion was issued directly to defendant. It does not appear that defendant ever requested the Administrator for such an opinion. In view of the numerous widely publicized opinions issued by the Administrator in individual cases, upon request (see sections entitled "Advisory Opinions on Fair Labor Standards Act," "Employers Questions Answered," "Official Answers to Questions," and similar headings in practically every issue of the Wage-Hour Reporter, from October 31, 1938, to the present time), in addition to the more general and formal interpretative bulletins, defendant in all probability knew he could have secured an opinion as to his individual situation, had he cared to inquire.

wrote one of the home workers stating that "we are not yet sending out any work. I shall be more than happy when (and if) the time comes when I can write you to say we are again sending it out. In the meantime we will all just have to be patient, and hope for the best. * * * I hope to be able to have better news at some future date, but please do not count on it for some time to come." (R. 422.)

On July 14, 1941, the Administrator brought suit for an injunction (R. 2–8). Respondent defended on the grounds that the home workers were not its employees and that, in any event, it had ceased violating before the commencement of suit (R. 20–23). The district court concluded that the home workers were employees within the meaning of the Act and, therefore, subject to its provisions, and that cause had been shown for the issuance of an injunction (R. 441–451). The court rejected respondent's contention that no injunction should issue because it had acted in "good faith" in assuming, on the advice of its attorneys, that the home workers were independent contractors, and because it had discontinued the violations before the institution of this action. Stating that "the defendant was insisting that it was within its legal rights" and had violated the Act "with respect to a large number of persons," the court held that the circumstances warranted the issuance of an injunction (R. 451).

On appeal, the respondent continued its insistence that the home workers were independent contractors and therefore not subject to the Act, though also contending that no injunction should issue in any event since it had discontinued home work. The court below reversed the judgment of the district court and directed dismissal of the complaint. The circumstances regarded by the Circuit Court of Appeals as controlling were that respondent had acted "in good faith," upon advice of counsel that the workers were independent contractors; that after the Government investigators inspected respondent's records, the distribution of work to home workers was discontinued; and that respondent's officers testified that they had no intention of resuming this practice (R. 515). The court did not decide whether the home workers were employees under the Act, but held that the district court "was not authorized to grant an injunction" under the circumstances.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decisions of two other Circuit Courts of Appeals. In *Fleming* v. *Jacksonville Paper Co.*, 128 F. (2d) 395, it was claimed that violations of the Act had ceased after the commencement of an inspection by the Administrator. Although the contention was made there, as in the instant case,

that this defeated the Administrator's right to an injunction, the Circuit Court of Appeals for the Fifth Circuit held (p. 399) that "it is clear there had been recent violations, and there was still contention and this was enough to ground the grant of injunction upon." The cessation of violations as "the result of recent official pressure" was, therefore, held an insufficient basis for denying an injunction to the Administrator. Despite the presence of both "recent violations" discontinued only under official pressure, and continued "contention" in the instant case, the court below held that this was not sufficient ground for an injunction.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Fleming* v. *Cincinnati Union Terminal Co.*, 117 F. (2d) 1012, is also in conflict with the decision below. There the District Court had dismissed an action by the Administrator for injunctive relief on the ground that defendant had altered its plan of compensating its employees after the filing of suit. Although the Administrator did not challenge the legality of the new method of payment, the Court of Appeals reversed the dismissal, holding the denial by an employer that it had violated the Act, as charged by the Administrator, presented "justiciable issues which [the Administrator] has a right to have determined," notwithstanding discontinuance of the illegal practices. Compare,

contra, Walling v. *Shenandoah-Dives Mining Co.*, 6 Wage Hour Rept. 304 (C. C. A. 10).

2. The court below has decided an important Federal question in probable conflict with principles established in decisions of this Court and of other Circuit Courts of Appeals in cases arising under other statutes. This Court approved the enforcement of an order to cease and desist in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, and denied that its enforcement was improper "because it is obeyed or because changing circumstances indicated that the need for it may be less than when made." Likewise, it was this Court's conclusion in *Federal Trade Comm.* v. *Goodyear Co.*, 304 U. S. 257, 260, that compliance with the Commission's order pending recourse to the court did not deprive "the Commission of its right to have its order maintained if validly made" or remove the legal issues from the court's determination. This Court in *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 309–310, sustained the right of the Government "as a substantial trustee for the public under the act of Congress * * * to bring before the court and obtain its judgment" on the question of legality of trade practices, notwithstanding the abandonment of the challenged practices by the defendant. See also *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498.

The same principles have been applied in decisions by numerous Circuit Courts of Appeals which have held that discontinuance of violations, combined with a statement of intention not to resume them, does not justify denial of judicial enforcement. *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579 (C. C. A. 6); *Perma-Maid Co.* v. *Federal Trade Comm.*, 121 F. (2d) 282 (C. C. A. 6); *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295 (C. C. A. 6); *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Comm.*, 18 F. (2d) 866 (C. C. A. 8); *Chamber of Commerce* v. *Federal Trade Comm.*, 13 F. (2d) 673 (C. C. A. 8); *Guarantee Veterinary Co.* v. *Federal Trade Comm.*, 285 Fed. 853 (C. C. A. 2); *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307 (C. C. A. 7). These decisions hold that the Government agency is not obliged to assume that such practices will not be resumed,[4] or to accept the assurances of one who continues to assert the legality of the challenged practices,[5] and that the Government official's duty is not discharged by abandoning

[4] *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Comm.*, 18 F. (2d) 866, 871 (C. C. A. 8); *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295 (C. C. A. 6).

[5] *Otis & Co.* v. *Securities & Exchange Comm.*, 106 F. (2d) 579, 584 (C. C. A. 6); *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7).

the complaint on a showing that the unlawful practices have been discontinued.[6]

These cases involved a variety of statutes, some providing for resort to the court to enforce an administrative order and others providing for application to the court for injunctive relief without a prior administrative hearing or order. The language of Section 17 does not differ materially from the provisions in these statutes prescribing the enforcement powers of the courts. The comparable provision of the Securities and Exchange Act, for example, is that *"upon a proper showing* a permanent or temporary injunction or restraining order shall be granted." [Italics supplied.] (15 U. S. C. 78 (u).) Under the National Labor Relations Act the court "shall have power" to enter a decree enforcing, modifying or setting aside the order of the Board (29 U. S. C. 160 (e)). There is thus no occasion for construing the language "cause shown" in Section 17 of the Fair Labor Standards Act as meaning something different from a showing which would warrant judicial enforcement under these other acts. The purpose of providing for judicial enforcement is the same with respect to all of the statutes, that is, to insure adequate enforcement by providing the effective restraint

[6] *Perma-Maid Co.* v. *Federal Trade Comm.*, 121 F. (2d) 282, 284–285 (C. C. A. 6).

afforded by judicial sanction. The application of the remedy in Section 17 of the present Act does not "call for a balancing of equities or for the invocation of the generalities of judicial maxims." *United States* v. *San Francisco,* 310 U. S. 16, 30. "Where an injunction is authorized by statute it is enough if the statutory conditions are satisfied." *Henderson* v. *Burd,* 133 F. (2d 515, 517 (C. C. A. 2).[7]

3. The question involved is one of large importance in the administration of the Fair Labor Standards Act. Its significance is measured by the importance of the injunction to the effective enforcement of the Act. The Act is a statute of general and very wide application. "The problem of enforcement is intricate and exacting." *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, dissenting opinion of Mr. Justice Douglas at p. 368. In a task of such magnitude the additional assurance of compliance that is afforded by an injunction is of special value. Without an injunction there is no assurance that a violator "would not continue its former course," "if it could shake [the Administrator's] * * * hand from its shoulder." *Sears, Roebuck & Co.* v. *Federal Trade Comm.,* 258 Fed. 307, 310 (C. C. A. 7). The added measure of security afforded by judi-

[7] Even in ordinary equity suits between private parties, an injunction may be granted although violations have ceased prior to the institution of suit. *Goshen Mfg. Co.* v. *Myers Mfg. Co.,* 242 U. S. 202.

cial restraint is of particular importance because of the effect of violations upon competitive conditions. A violator can secure such immediate and substantial competitive advantage by noncompliance, even for only occasional short periods, that the promise of compliance by a past offender does not inspire confidence. Competitors, lacking confidence in such promises, may be impelled to seek the same advantages of noncompliance, with the consequent possibility of a general break-down of enforcement.

The Administrator believes that the injunctive remedy has been the most effective single measure in securing widespread compliance with the Act. If this remedy can be frustrated by mere discontinuance of illegal conduct when the violator is discovered, the civil enforcement remedy becomes virtually meaningless. One of the most important enforcement measures which has been made available by Section 17 is the consent decree, which assures comparatively inexpensive and expeditious compliance. The consent decrees, of course, greatly outnumber the injunctions issued in litigated cases, and they are responsible for a very substantial part of the successful enforcement of the Act. Such decrees will be unobtainable, of course, if the violator feels he need only give his promise not to resume violations.

Furthermore, the ruling of the court below that proof of substantial past violations is insufficient to warrant an injunction imposes an almost im-

possible burden on the Administrator. Responsible administrative action cannot be taken instantaneously upon the termination of an investigation. The impracticability of conducting a continuous investigation until the date suit is instituted or the trial is held precludes his securing such proof as the court below deemed essential. Proof of the likelihood of resumption of violations is equally difficult if evidence of substantial past violations over a long period of time and continued contention by the employer do not establish reason to anticipate future violations.

The injunctive remedy is the only civil enforcement remedy provided for the Administrator.[8] It is particularly appropriate for the deter-

[8] Section 16 (a) provides criminal penalties for *wilful* violations. Adequate determination of interpretative questions in criminal cases is not feasible (1) because of the more stringent requirements of proof, and (2) because such questions usually arise on the pleadings by way of a motion to quash or a demurrer. Many of the complicated interpretative questions that arise under the Fair Labor Standards Act cannot be properly decided merely upon pleadings. The difficulties inherent in attempting to obtain general compliance with this type of statute through criminal prosecution has been recognized by Congress in numerous instances. The Securities and Exchange Act, the Sherman Act, the Clayton Act, and others, make provision for civil restraining orders and injunctions as well as for criminal penalties.

Section 16 (b) of the Act, providing for employee suits, is likewise inadequate for interpretative purposes. Employees do not have the broad investigatory powers of the Administrator nor the general public interest or responsibility to make adequate presentation of the facts and considerations bearing on interpretative questions.

mination of disputed questions of statutory construction. As demonstrated in the instant case, no authoritative determination of controversial interpretative issues can be secured if the injunction is denied merely because the respondent has ceased violating under official pressure.

CONCLUSION

We respectfully submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

CHARLES FAHY,
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